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Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 618

UNITED STATES LINES COMPANY,

Petitioner,

—against—

ST. PAUL FIRE AND MARINE INSURANCE CO.,

Respondent.

RESPONDENT'S REPLY TO THE PETITION FOR CERTIORARI

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Jurisdiction

The petition seeks to have the interlocutory order and judgment of the United States Court of Appeals for the Second Circuit reviewed by invoking the jurisdiction of this Court under 28 U. S. C. Sec. 1254(1). The petitioner also attempts to invoke the jurisdiction under Rule 19 of this Court.

Questions Presented

None of the questions sought to be presented by petitioner is involved in this case for the very simple and sufficient reason that the claim against petitioner

was not time-barred at the time petitioner was brought into the action pursuant to Rule 14(a) of the Federal Rules of Civil Procedure. Clearly, therefore, the use of Rule 14(a) did not create any rights in respondent's favor and did not deprive petitioner of any defense based upon a year-to-sue limitation because no such defense existed at the time Rule 14(a) was invoked.

Statement

This suit was instituted against respondent, St. Paul Fire & Marine Insurance Co., by plaintiff to recover alleged damage to five shipments of radio-phonographs shipped from Hamburg, Germany, to New York on five vessels of the petitioner, United States Lines Company. On October 31, 1956 respondent obtained an order pursuant to Rule 14(a) of the Federal Rules of Civil Procedure directing that the petitioner be made a party to this action. The third party summons and complaint were filed in Court on November 1 and served upon the petitioner by the United States Marshal on November 2, 1956.

It is conceded that the third party summons and complaint were served within the one-year limitation contained in the bills of lading issued by petitioner.

On July 31, 1957, after the year had expired, petitioner made a motion to dismiss the third-party complaint on the ground that as plaintiff did not sue the third party defendant within one year, the claim was time-barred by the provisions of the bills of lading and the Carriage of Goods by Sea Act.

The District Court granted the motion and in dismissing the third party complaint stated that "more than one year has elapsed" and that it did not appear that either the plaintiff, M. V. M. Inc., or the defendant, St. Paul, had asserted a timely cause of action against the third party defendant.

The Court of Appeals recognizing the factual situation in this case where the third party summons and complaint were served upon petitioner within the year limitation, stated:

> "Viewed from USL's standpoint of safeguarding its substantive rights, it can make no difference whether the consignee or the insurance company files the claim against it. In either case it has equally timely notice of the loss and the claim asserted."

and concluded:

> "USL is not prejudiced in any way by this result because it is privileged to plead any and all defenses, substantive and procedural, it may have."

Reasons for Denying the Writ

(1) The judgment of the Court of Appeals which petitioner is seeking to have reviewed by writ of certiorari is not final. As the Court of Appeals stated in its opinion, the petitioner is privileged to plead any and all defenses it may have. It is entirely possible that the trial of the issues in this action will establish that the plaintiff has no cause of action against either the petitioner or respondent.

(2) There is no conflict between the Circuits. The petitioner's attempt to make out a conflict on the principles of subrogation fails for the rather obvious reason that there was no attempt by respondent, at any time, to assert any right greater than that possessed by plaintiff.

The cases cited by petitioner concerning the basic fundamentals of subrogation have no bearing on this case. It is not disputed that a subrogee obtains no greater rights than those possessed by the subrogor. At the time petitioner was brought into this action plaintiff had the right to sue petitioner and respondent claimed no greater right than that. The only issue on appeal was whether respondent was precluded from doing this because it had not paid the claim to plaintiff. This same question has been presented to the Courts so often that there is now an unbroken line of cases which hold that in order to bring a third party into an action it is not necessary that the original defendant's right of subrogation be matured by payment to plaintiff. All that is required is that there be a possibility that defendant may be liable to plaintiff.

There is no conflict between the Court of Appeals' decision in this case and prior decisions. On the contrary, the law is so well established on this point that if the Court of Appeals had decided otherwise, it would have been in direct conflict with the Court of Appeals for the Fourth Circuit, the United States District Courts in Maryland, Minnesota and Nebraska and the New York Appellate Division, First Department.

The third-party defendant was brought into this action under the following Rule 14(a) of the Federal Rules of Civil Procedure:

> "a. When Defendant May Bring In Third Party. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

In *Glens Falls Indemnity Co.* v. *Atlantic Bldg. Corp.*, 199 F. (2d) 60 (1952), the District Court dismissed the third-party complaint on the ground that the insurance company was not entitled to subrogation until it had paid to the insured the amount claimed by it. The Court of Appeals for the Fourth Circuit, in reversing the District Court, stated at p. 63:

> "The purpose of the rule (14A) is to permit additional parties whose rights may be affected by the decision in the original action to be joined and brought in so as to expedite the final determination of the rights and liabilities of all of the interested persons in one suit. * * * It is generally held that it is no obstacle to a third party action that the liability, if any, of the third party defendant can be established only after that of the original defendant and after the satisfaction of the plaintiff's claim, where subrogation is the basis of the claim. See Lees Inc. v. Transcontinental Underwriters, D. C. Md., 9 F. R. D. 470, and cases cited."

And at p. 64:

> "In the pending case, however, the third party action was dismissed under the mistaken opinion that the right of the Insurance Company to be subrogated to the rights of the insured could not be determined until the Insurance Company had paid the loss. The third party action was not and could not have been dismissed in the exercise of the court's discretion, because this would clearly frustrate the purpose of the rule."

In *Concordia College Corp.* v. *Great American Ins. Co.*, 14 F. R. D. 403 (D. C. Minn. 1953), where it was claimed that the use of the third party procedure was premature and that the insurance company had no right of subrogation, the Court followed the prior cases and stated, at p. 405:

> "The claim to be asserted in the third-party complaint being based upon a theory of subrogation and conditioned as to its inception upon the payment of a claim under the policy, could not be asserted in an independent action until such condition had occurred. In this sense the granting of the motion will accelerate the time in which the claim, if one exists, may be presented. However, the language of Rule 14 contemplates the presentation of such conditional claim when it speaks of the impleader of a party 'who is or *may be* liable'. And the mere acceleration in time does not make the presentation of such claim premature. Jeub v. B/G Foods, Inc., D. C. 2 F. R. D. 238."

In *Lee's Inc.* v. *Transcontinental Underwriters*, 9 F. R. D. 470 (D. C. Maryland, 1949), the Court stated, at p. 471:

> "The nature of the defendant's claim is that of subrogation, a familiar doctrine of property insurance law. Of course the third-party defendants are not *presently* liable to the original defendant but they *may* become so as a result of the litigation. I think that the decided cases have sufficiently established that it is no obstacle to the application of this third-party practice that the liability, if any, of the third-party defendant, can only be established after that of the original defendant and, of course, where subrogation is the basis of the claim, after satisfaction of the plaintiff's claim if and when established. 1948, 3 Moore's Fed. Prac. p. 423; Burris v. American Chicle Co., 2 Cir., 1941, 120 F. 2d 218; Illinois v. Maryland Casualty Co., D. C. N. D. Ill. 1941, 2 F. R. D. 241; Greenleaf v. Huntingdon, etc., Coal Co., D. C. E. D. Pa., 1942, 3 F. R. D. 24. See also 1938, 1 Moore's Fed. Prac. p. 749." (Court's italics.)

To the same effect is *Elgin Cooperative Credit Assn.* v. *American Employers Ins. Co.*, 14 F. R. D. 414 (1950, D. C. Nebraska).

In New York State, where the counterpart of Rule 14(a) is Sec. 193(a) of the Civil Practice Act, the very same question was presented to the Appellate Division, First Department in *Madison Ave. Prop. Corp.* v. *Royal Ins. Co.*, 281 App. Div. 641, where the Court stated, at p. 644:

> "This section was enacted to avoid multiplicity

of suits and to enable several controversies to be tried at one time, thereby saving time and expense for the parties and court.

Under the express language of this statute, a party 'who is or *may be liable* to him for all or part of the plaintiff's claim' (italics ours) may be joined by the defendant as a third-party defendant. * * * Applying these principles to the case at bar, Arc 'may be liable', to defendant insurance companies, for all or part of Madison's claim against them. If Madison recovers against insurance companies, the latter, by subrogation, may recover the amount paid to Madison because of Arc's negligence or breach of contract, or both. In such circumstances, impleader is proper."

(3) The decision of the Court of Appeals in no way abridged, enlarged or modified the substantive rights of petitioner. The petitioner is claiming that the bills of lading gave it a one-year time to sue defense and that the decision of the Court of Appeals deprived it of this substantive right.

At no time did the respondent ever contend that the year-to-sue clause was invalid. On the contrary, respondent maintains that it was complied with when the third-party summons and complaint were filed in Court and served by the United States Marshal on the petitioner within the year.

The petitioner's argument and citation of cases concerning the Carriage of Goods by Sea Act, the validity of the year clause and the substantive rights of petitioner has no application to the facts in this case. What petitioner is really contending is that it was deprived of a possible defense when suit was

brought against it within the year. Is this depriving the petitioner of a substantive right? The same argument could be used in every third-party action because by bringing the third-party into the suit it is depriving the third-party defendant of setting up some statute of limitations.

It is clear that Rule 14(a) does not conflict with any substantive law in this case because at the time the suit was brought against petitioner it did not have any substantive defense based upon the year clause. The substantive right of petitioner to set up the year clause as a defense could not possibly accrue until the year had run and at that time suit had already been brought against it.

(4) The decision of the Court of Appeals was in conformity with the history and purpose of Rule 14(a). It has been repeatedly held since the Federal Rules were adopted that the purpose of Rule 14 is to avoid circuity of action and that it should be liberally construed so that disputed matters growing out of the same matter may be resolved in one action. *Balcoff* v. *Teagarden*, 36 F. Supp. 224, 225; *Jeub* v. *B/G Foods, Inc.*, 2 F. R. D. 238; *Russell, Poling & Co.* v. *United States of America* v. *Conners Marine Corp.*, 140 F. Supp. 890, 893.

In this case the issues in the action against the insurance company and the action against the steamship company will be very similar, if not identical, and the proof necessary on the part of the plaintiff against the respondent would have to be repeated if a separate action had to be maintained by the respondent against petitioner.

The Court of Appeals correctly applied the well-established law to the facts in this case when it stated:

> "Rule 14 was designed to permit third-party defendants to be brought into the action so that the rights of the original defendant and the third-party defendant could be established in the same trial. To hold that the plaintiff must proceed against the Insurance Company and that the Insurance Company can take no steps to sue USL until liability has been determined and the judgment paid would make of Rule 14 a nullity."

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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